90-1826

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1990 TERM

CALVERT H. FLETCHER
and N. KARENE FLETCHER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals,
Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW:

1) Whether this action is barred by the applicable statute of limitations.

2) Whether the trial court erred in instructing the jury that it could convict the Defendants of conspiracy to defraud the government if it found that they consciously avoided learning of the unlawful goals of the conspiracy.

3) Whether the trial court erred in instructing the jury that it could consider a defendant's educational and career background and expertise as it relates to specific intent to commit the alleged offense.

4) Whether the trial court erred in excluding proffered expert testimony as to the lawful tax advantages that formerly existed for setting up foreign trusts and for United States citizens' ownership of foreign corporations.

LIST OF PARTIES:

This cause is a criminal prosecution in which the United States of America is the Plaintiff; the Petitioner-Defendants are Calvert Hugh Fletcher and his wife N. Karene (Kay) Fletcher. The record refers to Mrs. Fletcher by a number of variants of her name.*

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* The Petitioner Mrs. Fletcher's testimony indicates that she was born Nelda Karene Hagan. Her first husband, whom she married in 1952, is named Grimsley, a name by which she was long known. In 1981, after her children born of her first marriage had reached adulthood, she resumed the use of her maiden name, Hagan, pursuant to a change of name sought by her and ordered by the appropriate court. Since her marriage to the Petitioner Mr. Fletcher on September 19, 1982, her full legal name has been Nelda Karene Hagan Fletcher. From 1952 until 1981 her full legal name was Nelda Karene Hagan Grimsley. In the interim her full legal name was Nelda Karene Hagan.

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OPINION BELOW:

On March 4, 1991, the United States Court of Appeals, Second Circuit, affirmed the judgment of conviction of the Petitioners rendered after a jury trial in the United States District Court for the District of Connecticut. The text of the opinion of the Court of Appeals appears in the Appendix to this Petition at pages App. 1-35.

GROUNDS OF JURISDICTION:

The jurisdiction of this Court is invoked pursuant to 28 United States Code § 1254(1) (1988).

STATUTE TO BE REVIEWED:

18 United States Code § 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

STATEMENT OF THE CASE:

The Petitioners Calvert H. Fletcher and N. Karene Fletcher seek review by certiorari of the March 4, 1991 judgment of the United States Court of Appeals, Second Circuit, which judgment affirmed the conviction of the Petitioners following a jury trial in the United States District Court for the District of Connecticut, the Honorable T. F. Gilroy Daly presiding.

The Petitioners were charged in a one-count indictment, returned on April 4, 1989, with a violation of 18 United States Code § 371, to wit: conspiracy to defraud the United States by impeding, impairing, obstructing, and defeating the lawful Government functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and

collection of revenue: to wit, income taxes." (App. 37.) The jurisdiction of the trial court appears to have been invoked pursuant to 18 U.S.C. § 3231.

The jury trial began on September 5, 1989 and ended on September 25, 1989 after eight (8) days of trial. The jury found both Petitioners guilty. The trial court on November 29, 1989 sentenced Mr. Fletcher to twenty-two (22) months' incarceration and a $10,000 committed fine. On that date Mrs. Fletcher was sentenced to two (2) years' incarceration, execution suspended after two (2) months, three (3) years' probation and a $10,000 committed fine.

The Petitioners filed timely notices of appeal on December 7, 1989. The United States Court of Appeals, Second Circuit, granted Mr. Fletcher's motion for bail pending appeal, and the trial court stayed

execution of Mrs. Fletcher's sentence. The Court of Appeals affirmed the judgment of the trial court in an opinion filed March 4, 1991. The mandate of the Court of Appeals was stayed for thirty (30) days in an order of April 2, 1991, which stay has since been extended for an additional thirty (30) days.

The indictment, the full text of which appears in the Appendix at pages App. 36-54, alleged a conspiracy "to defraud the United States by impeding, impairing, obstructing and defeating the lawful Government functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and collection of revenue, to wit, income taxes."[1] The alleged conspirators included

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[1] As set forth more particularly hereinbelow, it is of considerable significance to the statute of limitations issue that no other objective of the alleged conspiracy, such as enrichment

the Petitioners Calvert H. (Hugh) Fletcher and N. Karene Fletcher and two unindicted persons, Robert G. Morrison and Gene Quirini. App. 37-40.

Twenty-four (24) paragraphs of the indictment described various alleged overt acts in furtherance of the conspiracy, all occurring between November 1979 and April 5, 1983. App. 44-54. The only acts alleged in the indictment to be "overt acts" occurring within the limitation period applicable to this prosecution are the termination of an alleged partnership among the "conspirators" and the execution of a promissory note in favor of Robert G. Morrison on April 5, 1983.[2]

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of the alleged conspirators, was pled in the indictment.

[2] Specifically, the indictment alleges (App. 53-54):

> 38. On or about April 5, 1983, the Commemorative Products partnership was terminated by an agreement signed by Robert G. Morrison,

Proof at trial showed that in 1979 Robert Morrison, the president and sole stockholder of Morrison's Security Wholesale, Inc. (MSW), approached the Petitioner Hugh Fletcher, who was in charge of manufacturing for the Winchester Division of the Olin Corporation,[3] with a proposal for

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Gene Quirini, and the defendant N. KARENE FLETCHER aka KARENE GRIMSLEY aka KARENE HAGAN aka KARENE (GRIMSLEY) HAGAN aka KAY HAGAN aka N. K. (GRIMSLEY) FLETCHER, who signed in the name "KARENE GRIMSLEY HAGAN." Defendant N. KARENE FLETCHER aka KARENE GRIMSLEY aka KARENE HAGAN aka KARENE (GRIMSLEY) HAGAN aka KAY HAGAN aka N. K. (GRIMSLEY) FLETCHER, using the name "KARENE GRIMSLEY HAGAN" and Gene Quirini executed a promissory note in favor of Robert G. Morrison guaranteed by defendant CALVERT H. FLETCHER aka HUGH FLETCHER.

The indictment is strangely silent as to the manner in which the actions alleged in Paragraph 38 thereof "imped[ed,] impair[ed,] obstruct[ed] and defeat[ed] the lawful Government functions of the Internal Revenue Service[.]"

[3] During the time period of the alleged conspiracy, Mr. Fletcher organized a leveraged buyout by several employees of the Winchester Division from the Olin Corporation. Mr. Fletcher served as president and later as chairman of the resulting manufacturing company, named United States Repeating Arms Company (USRAC). While Olin/Winchester had approved the Border Patrol commemorative

Winchester to manufacture and Morrison to market a special rifle commemorating the United States Border Patrol. The details of the subsequent course of events between Morrison and Mr. Fletcher are sharply disputed.

Testimony at trial showed that Mr. Fletcher agreed to help facilitate the manufacture of the commemorative rifle, and an entity known as Commemorative Products, Ltd. (CPL)[4] was established for the purpose

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project, the actual manufacture of these rifles was done by USRAC. Morrison, who was an investor in USRAC, was employed by USRAC as a consultant.

[4] The nature of the beast of Commemorative Products (CPL) was disputed. Morrison claimed that this entity was a partnership; Quirini and both the Petitioners testified that the intention of the participants in CPL was for Mrs. Fletcher and Mr. Quirini, a Chicago business associate of Mr. Fletcher, to become shareholders in Morrison's Security Wholesale (MSW), on whose books the transactions of CPL were recorded. MSW held a federal firearms license which was essential to marketing the commemorative rifles.

The testimony of Morrison was that Hugh Fletcher demanded and received a 50% interest in the anticipated rifle profits, with Quirini and

of marketing the rifles, as well as a series of numbered lithographic prints of

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Mrs. Fletcher acting as "fronts" for Mr. Fletcher's interest. A document which the government characterized as a partnership agreement was executed between MSW and G & A Quirini Partnership, which was a partnership between Gene Quirini and his brother Anthony Quirini. Gene Quirini testified that the purpose of this agreement was to show Olin/Winchester that CPL had sufficient funding, but that the intention was for CPL to operate as a corporation. Gene Quirini testified that he joined the venture on his own and not as a front for Fletcher. Gene Quirini and Mrs. Fletcher testified that the profits of the venture were to be divided evenly among Morrison, Gene Quirini and Mrs. Fletcher. Mr. Fletcher disclaimed any financial interest in the venture and testified that he acted only as a consultant or adviser. It is uncontroverted that Mr. Fletcher sought to keep his association with the CPL principals secret from his employer because Mrs. Fletcher's interest therein represented a potential conflict of interest.

It is uncontroverted that Morrison concealed the CPL venture from his accountant and that no separate partnership income tax return was filed on behalf of CPL for 1981 and 1982. It is uncontroverted that, at the time CPL was formed, MSW had a carry-forward tax loss. Morrison (who testified that he graduated with a master's degree in corporate management and that he has held several executive positions in firearms sales and marketing) testified that he did not know what a carry-forward tax loss is; Mr. Fletcher testified that it was important that CPL could take advantage of MSW's tax loss, against which CPL's anticipated profits could be offset.

an oil painting sold to buyers of the rifle.

The principal government witnesses at trial included the unindicted, alleged co-conspirators Morrison and Quirini, the former of whom had made a deal to plead guilty to one count of failure to file a partnership tax return, and the latter of whom testified pursuant to a grant of immunity. The proof adduced by the government from these witnesses, especially from Morrison, is set forth in some detail in the opinion of the Court of Appeals. App. 3-9. Another principal government witness was Internal Revenue Agent Donald Crean, who testified to his findings as to an examination of the books and records of Morrison's Security Wholesale. Both Petitioners testified in their defense.

Testimony shows that the CPL principals, on the advice of Mr. Fletcher, agreed to have the lithograph prints produced in the United Kingdom and sent to the Bahamas where they would be finished and shipped to MSW through a Bahamian corporation set up for that purpose. Fletcher advised the CPL principals that there could be tax advantages to this arrangement.

Morrison's testimony was that the cost for the lithograph was to be inflated so that the firearm project would show less profit. Profits from the sale of the prints were to stay in the Bahamas, and some money was to be spent offshore.

The witnesses differed as to the reason for the Bahamas transactions--while Morrison testified that producing the prints abroad would allow profits to be realized offshore in order to defraud the Internal

Revenue Service, Quirini and Mrs. Fletcher testified that they understood this to be a lawful tax shelter. Quirini and Mr. and Mrs. Fletcher each testified that the group was looking for legal ways not to have to pay tax on the profits.

Testimony shows that friction developed among the CPL principals when Morrison refused to allow Mrs. Fletcher to examine the books of CPL. After CPL had shipped several commemorative rifles and prints, Mr. Fletcher eventually inspected the CPL books, whereupon he saw that Morrison/MSW was unable to pay USRAC for the rifles and that there was no prospect of his becoming able to pay. By early 1983, CPL owed USRAC about $247,000 for unpaid invoices. Morrison began to threaten Fletcher with exposure of his role in CPL to USRAC unless Fletcher met various demands.

Testimony indicates that Morrison and Mr. and Mrs. Fletcher agreed to an end to the CPL venture whereby Fletcher arranged for Morrison to transfer back to USRAC stock in the company that Morrison had bought in 1981, in order to satisfy Morrison's unpaid debt to USRAC for the rifles. After the stock redemption was effected on March 24, 1983, Morrison went to Richard Pelton, Executive Vice-president of USRAC, and told Pelton of Fletcher's involvement with CPL.

Proof at trial indicates that the CPL venture was dissolved in a document signed on April 5, 1983 by Morrison, Gene Quirini and Karene Fletcher. As part of the negotiated dissolution, Hugh Fletcher guaranteed a $50,000 note from Quirini and Mrs. Fletcher to Morrison, the proceeds of which were to be used to pay Morrison's attorney

fees. This note was paid in 1984, and there is no testimony whatever that the April 5, 1983 execution or the later payment of this note had anything to do with determination of any person's or entity's tax liability or in any manner impeded, impaired, obstructed and defeated the Internal Revenue Service in any governmental function, lawful or otherwise.

At trial Mr. and Mrs. Fletcher fully acknowledged the details of the Bahamas transactions, and both testified that they understood the perceived tax advantages of these transactions to be lawful. No testimony suggested that either Petitioner in any manner avoided learning of CPL's activities; to the contrary, they sought to inspect the CPL books but their efforts were frustrated by Robert Morrison.

Mr. and Mrs. Fletcher each testified that there was no agreement or undertaking to defraud the Internal Revenue Service--their earnest position was that CPL's activities were lawful according to Mr. Fletcher's knowledge and understanding of the income tax laws. The trial court nevertheless instructed the jury that it could convict the Defendants of conspiracy to defraud the government if it found that they consciously avoided learning of the unlawful goals of the conspiracy.[5]

Mr. Fletcher's testimony indicated that he is an attorney with an accounting background and that he has worked in several executive or management positions. Mrs. Fletcher's testimony indicated that she has worked as a bookkeeper for several differ-

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[5] This portion of the charge is set forth verbatim at pages 61-65 of the Appendix.

ent employers. The trial court instructed the jury that it could consider a defendant's educational and career background and expertise as it relates to specific intent to commit the alleged offense.[6]

The trial court excluded expert testimony from Gary Palmer, a certified public accountant called by the Petitioners, as to the tax advantages that once existed as to passing income through foreign trusts and as to United States citizens owning foreign corporations. The court ruled this testimony to be irrelevant in that it was likely to confuse the jury.

Defense counsel made an offer of proof, the full text of which appears at pages 55-59 of the Appendix, that Palmer would testify that there were substantial tax advan-

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[6] This portion of the charge is set forth verbatim at pages 60-61 of the Appendix.

tages to passing income through foreign trusts up until a little-known amendment to the tax laws. Prior to this amendment, a beneficiary of a foreign trust was permitted to treat distributions as partly a non-taxable return of principal, and partly as taxable ordinary income. Palmer would have testified that many people continued to believe that a tax advantage existed for distributions by foreign trusts after the 1976 amendment.

Counsel further proffered that Palmer would testify that, if a United States citizen was a shareholder in a foreign corporation, the corporation would be taxed at the local rate rather than the United States rate, and until dividends were paid there would be no tax effect to the United States citizen, a fact which could lead to a tax advantage.

At the close of the government's proof in-chief and again at the close of the evidence, the Petitioners moved for judgment of acquittal, arguing that the government had proven no overt act within the limitation period. These motions were overruled by the trial court.

REASONS FOR ALLOWING THE WRIT

The decision of the Court of Appeals in the matter at bar in several respects meets the criteria identified in Rule 10.1. of this Court such that discretionary review by this Court is appropriate. These criteria will be addressed separately as to each issue presented for review.

A. The Court of Appeals' treatment of the statute of limitations issue presents such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The six-year statute of limitations of 26 United States Code § 6531(1)[7] is appli-

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[7] **§ 6531. Periods of limitation on criminal prosecutions**

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years

cable to tax fraud conspiracies. The Court of Appeals correctly recognized that the limitations period begins to run after the last overt act in furtherance of the conspiracy. (App. 10.) The Court of Appeals, however, incorrectly applied to the instant indictment the principle of law recognized by this Court in *Grunewald v. United States*, 353 U.S. 391, 397, 77 S.Ct. 963, 970, 1 L.Ed.2d 931 (1957):

> . . . [T]he crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that

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next after the commission of the offense, except that the period of limitation shall be 6 years--

> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;
>
> (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;
>
> * * *

(Aug. 16, 1954, c. 736, 68A Stat. 815)

> which defines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy.

The only "overt act" within the limitation period relied upon by the Court of Appeals is the execution of a promissory note in connection with the dissolution of the CPL rifle venture. (App. 16.) The Court of Appeals reasoned that the execution of this note represented a distribution of partnership profits, and noted that, "[W]here a general objective of the conspirators is money, the conspiracy does not end, of necessity, before the spoils are divided among the miscreants." (App. 18.) As Justice Black said in another context, "This of course is true but this abstract proposition gets us nowhere in deciding this case." *Adderly v. State of*

Florida, 385 U.S. 39, 44, 87 S.Ct. 242, 245, 17 L.Ed.2d 149 (1966).

The appellate court's reasoning founders upon the literal language of the indictment, which nowhere charges that the conspirators' making money was an objective of the conspiracy. The indictment specifically identifies the only alleged objective of the conspiracy as being "to defraud the United States by impeding, impairing, obstructing, and defeating the lawful Government functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and collection of revenue: to wit, income taxes."

These Petitioners purely and simply were never called upon to answer any allegation that the distribution of money to the alleged conspirators was an objective of

the alleged conspiracy.[8] Even where the Government's theory is fully accredited, surely it is possible for the Government to be defrauded and the Internal Revenue Service impeded, impaired, obstructed and defrauded without partnership profits being distributed.

The Ninth Circuit Court of Appeals has opined that in a conspiracy to defraud case, "the statute of limitations starts to run on the date of the last overt act

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[8] This Court has recognized that conspiracy to defraud prosecutions "must be scrutinized carefully as to each of the charged defendants because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable." *Dennis v. United States,* 384 U.S. 855, 860, 86 S.Ct. 1840, 1843, 16 L.Ed.2d 973 (1966). As the Court of Appeals, Second Circuit, has opined in *United States v. Rosenblatt,* 554 F.2d 36, 41 (2d Cir. 1977), "It is an elementary principle of criminal pleading, that where the definition of an offense, . . . includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,--it must descend to particulars."

alleged to have caused the complainant injury." *United States v. Walker*, 653 F.2d 1343, 1347 (9th Cir. 1981), *cert. den'd*, 455 U.S. 908, 102 S.Ct. 1253, 71 L.Ed.2d 446. [Emphasis added.] "Under that test, the issue would be the last act that actually defrauded the United States." *Ibid.* [Emphasis added.] Nothing in the record in the case *sub judice* establishes that the execution of a promissory note in an arms-length transaction caused the United States injury or defrauded the Internal Revenue Service.[9]

Construing the instant indictment liberally in favor of the Government, the last overt act which even arguably could have caused injury to the Internal Revenue

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[9] The Court of Appeals correctly rejected the Government's contention that the dissolution of the CPL venture was an act of concealment in furtherance of the conspiracy. (App. 12-14.)

Service is the allegation that "On or about March 15, 1983, Robert G. Morrison willfully failed to file a partnership return for Commemorative Products for the calendar year 1982." The Government is inescapably hoist by its own petard.

This Court has long held that "Conviction on a charge not made would be a sheer denial of due process." *DeJonge v. State of Oregon*, 299 U.S. 353, 362, 57 S.Ct. 255, 259, 81 L.Ed. 278 (1937). The instant case is a conviction of a conspiracy, the objective of which was separate and apart from the objective which the Government had charged. This matter presents an important question of federal law as to the pleading requirements in § 371 cases where conspiracy to defraud an agency of government is attempted to be alleged. The conclusory, shotgun approach unfortunately countenanced

by the Court of Appeals represents a monstrous due process problem.[10]

Review by certiorari is appropriate in this case in order to keep the Government intellectually honest in its charging process, such that future defendants are not put to trial for conspiring to achieve unspecified objectives.

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[10] An additional, equally significant problem is present in that the instant indictment, returned on April 4, 1989, appears to be an example of the Government artfully pleading an ostensible conspiracy to defraud the Internal Revenue Service where the real gravamen of the conduct alleged in the indictment is conspiracy to commit the substantive offense of willfully attempting to evade or defeat tax, (26 U.S.C. § 7201,) a charge which would clearly have been time-barred after March 15, 1989.

Here, as in *Bridges v. United States*, 346 U.S. 209, 73 S.Ct. 1055, 97 L.Ed. 1557 (1953), the Government has employed prosecutorial sleight-of-hand by charging one clause of § 371 rather than the other as a cloak in order to revive a stale prosecution. *Cf., Dennis v. United States, supra*, 384 U.S. at 863, n.8.

B. There is a conflict among federal circuits as to when a "conscious avoidance" instruction as to guilty knowledge is appropriate.

The trial court charged the jury[11] that as to the Petitioners' knowledge of the unlawful aims of the conspiracy:

> A defendant may be found by you, the jury, to have knowledge of the conspiracy's unlawful objective if he or she acted with deliberate disregard of a high probability that the conspiracy had such an objective, unless you find that the or she actually believed that such an objective did not exist.

The Court of Appeals opined (App. 28) that "The conscious avoidance charge is commonly used in this circuit where a defendant claims lack of some specific aspect of knowledge necessary for conviction but where the evidence may be inter-

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[11] The full text of the portion of the jury charge on this issue is set forth at pages 61-65 of the Appendix.

preted as deliberate ignorance." The record does not show that the Petitioners claimed not to know about any of the transactions on which the Government based its allegation of conspiracy; to the contrary, they acknowledged significant familiarity with these events. The Petitioners contended that their intention was to reduce tax liability by lawful means. The only dispute as to knowledge is as to whether Mr. Fletcher knew that the law had been amended such that the perceived tax advantages of the Bahamian transactions were no longer available.[12]

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[12] The Petitioner Mr. Fletcher is a non-practicing attorney. Nothing in the record suggests that he deliberately avoided familiarizing himself with changes in the tax code.

The Court of Appeals nonetheless opined (App. 29-31):

> A factual predicate for the conscious avoidance charge existed in the ample evidence from which the jury could infer that defendants consciously avoided knowing the conspiracy's fraudulent purpose. While the defendants maintained

The Court of Appeals noted:

> . . . As in most tax fraud cases, the core dispute was whether the largely conceded business activities of the defendants were part of a knowing scheme to defraud the IRS. We have repeatedly held that a conscious avoidance charge is appropriate where the knowledge of

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> that, at all times, they were unaware of this purpose, the jury heard evidence of Fletcher's silent interest in the commemorative firearm project and the CPL partnership, Mrs. Fletcher's use of aliases, the fraudulent activities of the CPL partnership, the commingling of CPL and MSW funds, the failure to file partnership returns, the failure to provide accountants with accurate information, use of false taxpayer identification numbers, surreptitious movements of funds in the Bahamas and the use of fraudulent invoices that inflated the costs of the lithographs furnished to commemorative firearm customers. . . . . The jury was plainly entitled to view the defendants' alleged ignorance of the conspiracy's objectives in the face of such evidence as conscious avoidance. Thus, it was appropriate for the district court to have given this charge.

The flaw in this reasoning is that, as to each of the actions and omissions noted by the Court of Appeals, the Fletchers' participation in these transactions was either acknowledged or squarely disputed--neither Petitioner asserted any claim of an absence of knowledge except as to whether the Bahamas transactions were or were not lawful under the tax code. These Petitioners either knew that there was no lawful tax advantage or they did not know. The Court of Appeals has unfortunately been sidetracked by the Government's red herrings.

> the fraudulent goals of a conspiracy, as contrasted with knowing and intentional participation in the conspiracy, is at issue.

Where a defendant charged with conspiracy does not know the conspiracy's objective, he lacks the criminal intent necessary to support a conviction. "Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal." *Direct Sales Co., Inc. v. United States,* 319 U.S. 703, 711, 63 S.Ct. 1265, 1269, 87 L.Ed. 1674 (1943).

The instruction given in this case is similar to language found at § 2.02(7) of the American Law Institute Model Penal Code:

> When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence unless he actually believes that it does not exist.

See, United States v. Lanza, 790 F.2d 1015, 1021 (2d Cir. 1986), *cert. den'd sub nom.*

Lyubarsky v. United States, 479 U.S. 861, 107 S.Ct. 211, 93 L.Ed.2d 141.

In a conspiracy prosecution, a conscious avoidance instruction should be given only in regard to a defendant's knowledge of the unlawful aims and objectives of the scheme and not as to whether he knowingly participated in or became a member of the conspiracy. *Lanza*, 790 F.2d at 1022-23; *United States v. Heinemann*, 801 F.2d 86, 93 (2d Cir. 1986), *cert. den'd*, 479 U.S. 1094, 107 S.Ct. 1308, 94 L.Ed.2d 163 (1987).

The Court of Appeals, Ninth Circuit, has commented on the circumstances under which a jury is properly instructed on conscious avoidance in *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir. 1988), *cert. den'd*, 487 U.S. 1222, 108 S.Ct. 2880, 101 L.Ed.2d 915:

> A [conscious avoidance] instruction is properly given only when the defendant claims a lack of guilty knowledge and the proof at trial supports an inference

> of deliberate ignorance. . . . The cases in which the facts point to deliberate ignorance are relatively rare. . . . The instruction should, therefore, be given rarely because of the risk that the jury will convict on a standard of negligence: that the defendant *should* have known that the conduct was illegal. . . . Instead, the facts must support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution.

[Citations omitted; italics in original.]

There is a split of authority among the federal circuits as to when a "conscious avoidance" instruction is appropriate. This split has been acknowledged by the Court of Appeals, Second Circuit, in *United States v. Mang Sun Wong*, 884 F.2d 1537, 1542-43, n.5 (2d Cir. 1989). It appears that the Second Circuit permits a prosecutor to alternatively argue both conscious avoidance of knowledge of the unlawful nature of a transaction and direct know-

ledge thereof. *Mang Sun Wong*, 884 F.2d at 1542.

The Eighth, Ninth and Tenth Circuits have indicated that, where (as in the cause at bar) the proof points to either direct knowledge or a lack of guilty knowledge, it is error to give a conscious avoidance instruction. *United States v. White*, 794 F.2d 367, 371 (8th Cir. 1986)[13]; *United States v. Alvarado, supra*, 838 F.2d at 314; *United States v. Kelm*, 827 F.2d 1319, 1324

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[13] "The reason such an instruction should not be given in all cases is 'because of the possibility that the jury will be led to employ a negligence standard and convict a defendant on the impermissible ground that he should have known an illegal act was taking place.'"

794 F.2d at 371, quoting *United States v. Beckett*, 724 F.2d 855, 856 (9th Cir. 1984). In *White*, the government's evidence was that the defendant was an active participant in a theft, while the defendant's evidence was that he had no knowledge of the contents of a bag containing stolen mail until postal inspectors came to his door. The Court of Appeals ruled that the district court's giving a conscious avoidance instruction was error, albeit harmless. 794 F.2d at 371.

(9th Cir. 1987)[14]; *United States v. Manriquez Arbizo*, 833 F.2d 244, 248-49 (10th Cir. 1987).[15]

The matter at bar presents an appropriate case for this Court to resolve the inter-circuit conflict as to the circum-

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[14] "There must be evidence that the defendant purposely avoided learning all the facts in order to have a defense in the event of being arrested and charged. . . . It is not enough that the defendant was mistaken, recklessly disregarded the truth or negligently failed to inquire. . . . Likewise, if the evidence indicates that Kelm had actual knowledge of his obligations under the federal tax laws, then giving the [conscious avoidance] instruction was inappropriate."

827 F.2d at 1324. [Citations omitted.]

[15] ". . . [I]f the evidence against the defendant points solely to direct knowledge of the criminal venture, it would be error to give the instruction. . . . The danger in giving the instruction where there is evidence of direct knowledge but no evidence of avoidance of knowledge is that the jury could still convict a defendant who merely should have known about the criminal venture. . . ."

833 F.2d at 248-49. [Citations omitted.]

stances under which a conscious avoidance instruction should be given.

C. The treatment by the Court of Appeals of the instruction that the jury could consider the nature and extent of the Petitioners' educational and career background conflicts with this Court's decision in *Direct Sales Co., Inc. v. United States.*

The trial court instructed the jury that it could consider "the nature and extent of a defendant's educational and career background and expertise . . . but only as it relates to the question [of] specifically [sic] intent to commit the alleged offense." (Court of Appeals opinion, App. 22.[16]) The Court of Appeals opined, "We hold, as we have in the past, that the trier of fact may properly consider the

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[16] The full text of the portion of the jury charge on this issue is set forth at pages 60-61 of the Appendix.

general educational background and expertise of the defendant as bearing on the defendant's ability to form the requisite wilful intent[,]" citing *United States v. MacKenzie*, 777 F.2d 811, 818 (2d Cir. 1985); *United States v. Jacobs*, 475 F.2d 270, 280 (2d Cir.), *cert. denied sub nom. Lavelle v. United States*, 414 U.S. 821 (1973); and *United States v. Rischard*, 471 F.2d 105, 108 (8th Cir. 1973).

This instruction was obviously intended to focus attention on the Petitioner Mr. Fletcher's legal training and accounting background. The harm done by this challenged instruction is exacerbated when it is given in context with the conscious avoidance instruction discussed hereinabove. It defies reason to suggest that a person's status as an attorney or his having been educated in accounting is,

standing alone, probative of intent to commit a crime (or at least the legal and accounting professions would so hope). These instructions, taken together, invited the jury to determine whether Mr. Fletcher was a knowing participant in the alleged conspiracy according to a "should have known," negligence standard.

The essence of the crime of conspiracy is an agreement to commit an unlawful act. *Ianelli v. United States*, 420 U.S. 770, 777, 95 S.Ct. 1284, 1289, 43 L.Ed.2d 616 (1975). This Court has opined that, in a conspiracy prosecution, "knowledge [of an illegal objective] is the foundation of intent . . ." *Direct Sales Co.*, 319 U.S. at 711-12, 63 S.Ct. at 1269. In that decision the Court also stated:

> . . . [I]ntent [to commit an offense,] when given effect by an overt act, is the gist of conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not

> unrelated to such knowledge. Without the knowledge, the intent cannot exist. [Citation and footnote omitted.] Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. . . . This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes.

319 U.S. at 711, 63 S.Ct. at 1269. [Emphasis added.] *Accord: Ingram v. United States*, 360 U.S. 672, 680, 79 S.Ct. 1314, 1320, 3 L.Ed.2d 1503 (1959).

The practical effect of the jury instruction as to the Petitioners' educational and career background is to invite the jury to pile inference upon inference in exactly the manner condemned by this Court in *Direct Sales*. Review by certiorari is therefore appropriate according to Rule 10.1.(c) of this Court.

D. The exclusion of the proffered testimony of the certified public accountant conflicts with decisions of another Court of Appeals.

The Petitioners proffered expert testimony from Gary Palmer, a certified public accountant called by the Petitioners, as to the tax advantages that once existed as to passing income through foreign trusts and as to United States citizens owning foreign corporations, in order to show that Mr. Fletcher's mistaken belief as to the tax advantages of channeling income through foreign trusts and of ownership of foreign corporations was not unique at the time of the events in question.[17] The trial court ruled that this proffered testimony was irrelevant in that it was likely to confuse

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[17] The full text of the proffer appears at pages 55-59 of the Appendix.

the jury, and the Court of Appeals agreed. (App. 33-35.)

This Court has recently reiterated that "The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." *Cheek v. United States*, ___ U.S. ___, 111 S.Ct. 604, 609, 112 L.Ed.2d 617 (1991). In criminal tax cases:

> . . . [The prosecution's] burden requires negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good faith belief that he was not violating any of the provisions of the tax laws. This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist. . . .

___ U.S. at ___, 111 S.Ct. at 610-11. [Emphasis added.]

The Court of Appeals opined in the instant matter that "explaining the tax law

is generally within the purview of the court, not expert witnesses." (App. 34). The Petitioners submit, however, that proof that a significant number of people held the same misconception as Mr. Fletcher about the tax consequences of foreign trusts and ownership of foreign corporations was plainly probative of whether Mr. Fletcher's ignorance of the 1976 amendment which took away these tax advantages gave rise to a good faith belief by the Petitioners that their conduct was lawful.

At least two decisions of the Fifth Circuit Court of Appeal lend support to the Petitioners' position. In *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979), the court ruled that the exclusion of the defendant's proffered testimony of a certified public accountant that money received by the defendant in exchange for her blood

plasma was not within the definition of income amounted to reversible error. The court there opined:

> . . . In a case such as this where the element of willfulness is critical to the defense, the defendant is entitled to wide latitude in the introduction of evidence tending to show lack of intent. [Citations omitted.] The defendant testified that she subjectively thought that proceeds from the sale of part of her body were not taxable. By disallowing Nall's testimony that a recognized theory of tax law supports Garber's feelings, the court deprived the defendant of evidence showing her state of mind to be reasonable.

607 F.2d at 99.

In reversing a conviction on other grounds, the court in *United States v. Burton*, 737 F.2d 439 (5th Cir. 1984), found no error in the exclusion of the testimony of a tax professor that, despite its lack of legal acceptance, the defendant's theory and belief that wages are not taxable income was not implausible. The court opined:

> Though the credibility of a defendant's assertion that he was ignorant of the tax requirement must be left to the jury, it does not necessarily follow that evidence regarding the uncertainty of the controlling law is, a fortiori, sufficiently probative to overcome its potential for prejudice and confusion. Though evidence that others shared a misunderstanding of the law may be relevant to the credibility of a defendant's claim that he held a particular belief, under Fed.R.Evid. 403, a trial judge's analysis of admissibility only begins with the decision that proffered evidence is relevant. . . .

737 F.2d at 443.

The *Burton* court further opined, however, that "it is the defendant's state of mind at the time of the accused conduct which is at issue. . . . [A] defendant could offer competent evidence that his view was not unique but was shared by others . . ." *Ibid.*

The *Burton* court limited *Garber* to its facts, subject to a caveat which is critical to the instant case: "Evidence of

legal uncertainty, except as it relates to defendant's effort to show the source of his state of mind, need not be received . . ." It follows that evidence of legal uncertainty offered for that specified purpose, should be received.

Review by certiorari is appropriate to resolve the conflict between the Second and Fifth Circuits and in order to settle the law in this area by this Court.

CONCLUSION

For the reasons set forth hereinabove, the petitioners Calvert Hugh Fletcher and N. Karene Fletcher respectfully request that the writ of certiorari to the United States Court of Appeals, Second Circuit, be granted in this matter.

APPENDIX:

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1706--August Term, 1990

Argued September 14, 1990 Decided MAR-4 1991

Docket Nos. 90-1081 & 90-1082

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UNITED STATES OF AMERICA,

Appellee,

-v-

CALVERT H. FLETCHER, a/k/a "HUGH FLETCHER," N. KARENE FLETCHER, a/k/a "KARENE GRIMSLEY," a/k/a "KARENE HAGAN, a/k/a "KARENE (GRIMSLEY) HAGAN," a/k/a "KAY HAGAN," a/k/a N.K. (GRIMSLEY) FLETCHER,"

Defendants-Appellants.

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BEFORE:

Pratt, Mahoney and Walker,
Circuit Judges.

Appeal from the judgment of the United States district court for the District of Connecticut, T.F. Gilroy Daly, Judge, entered on September 5, 1989, convicting

Calvert H. Fletcher and N. Karene Fletcher after a jury trial of violating 18 U.S.C. 371 and sentencing Calvert H. Fletcher to twenty-two months and a $10,000 fine and N. Karene Fletcher to two years, execution suspended after two months, three years probation, and a fine of $10,000.

Affirmed.

WILLIAM. M. BLOSS, Jacobs, Grudberg, Belt & Dow, P.C., New Haven, Ct. (IRA B. GRUDBERG, Of Counsel) and RONALD A. BREDEMANN, Flood, Bredemann & Evans, Park Ridge, Ill. (JAMES J. RUANE, Of Counsel), for Defendants-Appellants.

LINDA K. LAGER, Assistant United States Attorney for the District of Connecticut (STANLEY A. TWARDY, JR., United States Attorney, Of Counsel), for Appellee.

WALKER, Circuit Judge:

Calvert H. and N. Karene Fletcher appeal from judgments of the Untied States Dis-

trict Court for the District of Connecticut, T.F. Daly, Judge, convicting them of conspiracy to defraud the Internal Revenue Service in violation of 18 U.S.C. 371. They assert that the statute of limitations expired before they were indicted, that the trial judge erroneously excluded certain expert testimony and that the trial judge erroneously instructed the jury that it might infer their participation in a conspiracy from their conscious avoidance of knowledge of that conspiracy and from Mr. Fletcher's educational background. Because we find these arguments to be without merit, we affirm the judgments of the district court.

BACKGROUND

In late 1979, Calvert H. Fletcher (Fletcher) was director of manufacturing for the Winchester Firearms division of the

Olin Corporation, later the United States Repeating Arms Company (Winchester). Unindicted co-conspirator Robert G. Morrison (Morrison), president and sole owner of Morrison's Security Wholesale, Inc., (MSW), approached Fletcher with a plan to manufacture and market a commemorative rifle. Although Fletcher was concerned that independently marketing the commemorative rifle might create a conflict of interest with his position at Winchester, he agreed to convince Winchester to manufacture the rifle. Fletcher demanded and received a 50% interest in the anticipated rifle profits. To conceal his conflict of interest from Winchester, Fletcher arranged to have his interest in the rifle business represented by an associate, unindicted co-conspirator Gene

Quirini, and by his future wife, N. Karene Fletcher (Mrs. Fletcher).

In 1980, Morrison and Quirini, acting on Fletcher's behalf, created a partnership called Commemorative Products, Ltd. (CPL) to market the rifles. The defendants used CPL as part of a two-part plan to defraud the Internal Revenue Service (IRS). First, Morrison, Fletcher, Mrs. Fletcher and Quirini agreed to record any profits of CPL on the books of MSW where they could be offset by MSW's carry-forward losses. Second, they agreed to minimize CPL's taxable profits by distributing numbered lithographic prints of an oil painting together with rifles, and artificially inflating the cost of the prints. The co-conspirators also agreed to transfer certain of the profits from the sale of the rifles to a pre-existing Bahamian bank

account controlled by Fletcher in the name of a shell corporation, Willowdale Industries, ostensibly to cover the costs of printing the lithographs. The parties further agreed that they would let the money remain off-shore in the Willowdale Industries account for some time before spending it, and that any spending would be off-shore. Morrison concealed the CPL partnership agreement from his accountant.

At Fletcher's direction, between May and November, 1981, Mrs. Fletcher and Morrison transferred $200,000 of the proceeds from the commemorative firearm undertaking to the Willowdale account in the Bahamas. In November, 1981, Morrison personally withdrew $50,000 from the account and then distributed the funds to themselves. At that time, Fletcher led Mrs. Fletcher and Morrison to believe there would be a later

distribution of the balance of the hidden funds.

In 1982, however, the scheme soon began to unravel due to co-conspirator fighting. During 1980 and early 1981, MSW had collected advance money from gun customers on behalf of CPL and, at Fletcher's direction, Morrison had transferred $253,000 of that money to a Chicago bank. Fletcher's agent Quirini, unbeknownst to Morrison, employed these funds to pay bills, taxes and loans for other non-CPL businesses in which he and the Fletchers were interested. Quirini, using a non-existent taxpayer ID number, also opened a bank account, to which only he and Fletcher had access, where he deposited some of the CPL money.

In 1983, after CPL fell behind in its payments to Winchester and Fletcher's

manipulation of CPL funds came to light, Morrison threatened to expose Fletcher's participation to Winchester. In March, 1983, Fletcher bought Morrison's silence by arranging for Winchester to redeem stock owned by Morrison. Fletcher also promised Morrison that he would receive his full share of the commemorative rifle profits. On April 5, 1983, Fletcher made good on this promise by directing Mrs. Fletcher to execute a stock escrow agreement that would turn over certain stock to Morrison effective January 1, 1984. In addition, on April 5, 1983 Fletcher directed Quirini and Mrs. Fletcher to execute a $50,000 promissory note to Morrison. Despite these measures, after the stock redemption in March, 1983, Morrison approached an executive of Winchester and told him about Fletcher's involvement with CPL. On April 5, 1983--

the date of Morrison's profit payoff--Morrison, Quirini and Mrs. Fletcher dissolved CPL. Morrison concealed from his accountant the termination of the CPL partnership agreement, as he had its formation, and did not file partnership returns for CPL in 1981 and 1982 as required by law.

At the trial, in which Morrison and Quirini testified for the government, Fletcher and Mrs. Fletcher were each convicted of a single count of conspiracy "to defraud the United States by impeding, impairing, obstructing and defeating the lawful Government functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and collection of revenue, to wit, income taxes," in violation of 18 U.S.C. 371. This appeal followed.

DISCUSSION

I. Statute of Limitations

The Fletchers argue that the government has failed to plead and prove that the conspirators committed an overt act within the six-year statute of limitations applicable to tax fraud conspiracies. 26 U.S.C. 6531(1); see United States v. Ingredient Technology Corp., 698 F.2d 88, 98-99 (2d Cir.), cert. denied, 462 U.S. 1131 (1983). The limitations period begins to run after the last overt act in furtherance of the conspiracy. Grunewald v. United States, 353 U.S. 391, 396-97 (1957); United States v. Brasco, 516 F.2d 816, 818 (2d Cir.), cert. denied, 423 U.S. 860 (1975). Since the indictment was filed on April 4, 1989, the central issue is whether any of the actions taken on April 5, 1983--specifically the partnership dissolution and the

execution of the promissory note and escrow agreement in favor of Morrison--furthered the main goals of the conspiracy.

A. Partnership Dissolution

In Grunewald, the Supreme Court explained that

> after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment. . . . [A] vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime.

Grunewald, 353 U.S. at 401-02, 405. Thus, the life of a conspiracy cannot be extended for statute of limitations purposes by acts of concealment occurring after the conspiracy's criminal objectives are "done in the context of a mutually understood need for

secrecy." Grunewald, 353 U.S. at 402; see Ingram v. United States, 360 U.S. 672, 679 n.10 (1959); Krulewitch v. U.S., 336 U.S. 440, 443-44 (1949). Rather, in determining whether acts are within the statute of limitations period, we look to the scope of the original conspiratorial agreement. See United States v. Sarantos, 455 F.2d 877, 883 (2d Cir. 1972).

The government contends that the dissolution of the CPL partnership was an act of concealment that furthered the main goals of the conspiracy. First, it urges that because the IRS had three years from the date of the filing of the Fletchers' 1982 tax return on June 17, 1983 to audit the Fletchers and assess them a deficiency, see 26 U.S.C. 6501(a), the dissolution was a means of warding off or foiling an audit:

> The dissolution agreement is . . . an overt act to the extent that any IRS agent looking at that dissolution

> agreement would still not be able to figure out who the real parties and interests are in this Commemorative Products undertakings, not the consequences of the dissolution.

Second, at oral argument, the government urged that dissolving the partnership relieved CPL of the need to file false or misleading tax returns.

Although the government maintains, based on Morrison's testimony, that the conspirators expressly contemplated concealment as part of their agreement and argues that the concealment is the essence of a tax fraud conspiracy, see United States v. Potamitis, 739 F.2d 784, 788 (2d Cir.) (quoting Grunewald, 353 U.S. at 405), cert. denied, 469 U.S. 934 (1984) (act of concealment was "essential" to success of robbery; jury could infer concealment was part of original conspiracy), we do not see how the dissolution of the partnership would further

that objective. United States v. Steele, 685 F.2d 793, 803 (3d Cir.), cert. denied sub nom. Mothon v. United States, 459 U.S. 908 (1982). Since the Bahamian lithographic scam had already rendered CPL profitless, the partnership dissolution, while it relieved the partnership from having to file future tax returns, would not lead to concealment of income, since there was no income that would be thereby concealed. Thus, since a reasonable jury could not have found that the partnership dissolution by itself concealed, or could have been expected to conceal, the tax fraud, the partnership dissolution cannot serve to commence the limitations period.

United States v. Cunningham, 723 F.2d 217 (2d Cir. 1983), cert. denied, 466 U.S. 951 (1984), on which the government relies, presented a far stronger case that the

overt acts taken--lying to a tax advisor, refusing to obey a subpoena, destroying evidence and misleading numerous investigators--directly furthered the conspiracy's main concealment objectives. In Cunningham, we did not mean to imply that every action undertaken during the life of a conspiracy, no matter how attenuated from the central aims of that conspiracy, necessarily becomes an act of concealment because of simple temporal fortuity. In this case, the partnership dissolution, like other legitimate business activities such as paying bills and opening bank accounts, served neither to hinder an investigation nor to hide material facts, and thus falls outside the scope of any express conspiracy to conceal. See Grunewald, 353 U.S. at 397; United States

v. Rosenblatt, 554 F.2d 36, 39 (2d Cir. 1977).

B. Execution of Promissory Note

However, we agree with the government that the execution of the promissory note on April 5, 1983, pled in the indictment and proved at trial, was an overt act in furtherance of one of the conspiracy's main objectives and thereby served to trigger the limitations period.

The Fletchers argue that the note did not further the conspiracy since Morrison testified that the note did not represent a profit payoff but was simply to cover his anticipated attorney's fees. The Fletchers also claim that because Morrison had already approached an executive of Winchester and exposed Fletcher's involvement with the commemorative rifle project by April 5, 1983, the conspiracy was necessarily termi-

nated by that date. We reject both contentions.

While testifying the note was to cover legal fees, Morrison also testified that the note was to "make up for some of the funds that had been missing from the Bahamian account." These missing funds represented the profits of the conspiracy that had been misappropriated by Quirini and the Fletchers. Thus, the government proved that Quirini and the Fletchers executed the note to secure for Morrison his fair share of the rifle profits. Since the conspiracy contemplated a division of profits among the co-conspirators, the execution of the note furthered one of its chief goals.

We also cannot agree that by April 5, 1983 Morrison had withdrawn from, and thereby effectively terminated, the con-

spiracy by reporting Fletcher's misdeed to Winchester. A conspiratorial agreement that includes a payoff to each conspirator continues, for statute of limitations purposes, until the conspirators receive their anticipated economic profits. United States v. Mennuti, 679 F.2d 1032, 1035 (2d Cir. 1982). "[W]here a general objective of the conspirators is money, the conspiracy does not end, of necessity, before the spoils are divided among the miscreants." Potamitis, 739 F.2d at 788 (quoting United States v. Knuckles, 581 F.2d 305, 313 (2d Cir.), cert. denied, 439 U.S. 986 (1978)); United States v. Walker, 653 F.2d 1343, 1347 (9th Cir. 1981), cert. denied, 455 U.S. 908 (1982). By his report to Winchester, Morrison at most abandoned a subsidiary objective of the conspiracy--the fraud on Winchester. He did not abandon either

of the conspiracy's chief goals of profit distribution and fraud on the government.[1]

C. Escrow Stock Agreement

The execution of the escrow stock agreement of April 5, 1983 was proven at trial but not pled in the indictment. Because we find that the execution of the promissory note on April 5, 1983, which was both pled and proven, was in furtherance of the main goals of the conspiracy, and thus satisfies the statute of limitations, we do not need to decide whether an overt act that is proven but not specified in the indictment, such as the execution of the escrow stock

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[1] Quirini testified that the inflated lithograph scam was designed to deceive inquisitive IRS agents and that Fletcher and Morrison shared this understanding. Morrison testified that the lithograph scheme was a "plan that we put together in order to defraud the Government, showing that we had spent for these prints more than what our actual cost was." The jury was entitled to credit these versions over Fletcher's statements that CPL was designed to deceive only his employer, Winchester, and not the IRS.

agreement, can satisfy the statute of limitations, an issue we left open in United States v. Guerro, 694 F.2d 898, 903 n.6 (2d Cir. 1983), cert. denied, 459 U.S. 1222 (1983).

II. Jury Instructions

The Fletchers object to the portions of the district court's jury instructions bearing on the defendants' knowledge. In this case, the government was required to establish (1) the defendants' knowing and intentional participation or membership in the scheme charged and (2) some knowledge of the unlawful aims and objectives of the scheme. United States v. Lanza, 790 F.2d 1015, 1022 (2d Cir.), cert. denied sub nom. Lyubarsky v. United States, 479 U.S. 861 (1986); see also United States v. Gurary, 860 F.2d 521, 527 (2d Cir. 1988), cert. denied, 490 U.S. 1035 (1989). On the first

element, knowing and intentional participation, the trial court instructed the jury that it could consider:

> the nature and extent of a defendant's educational career background and expertise in this regard, but only as it relates to the question [of] specifically [sic] intent to commit the alleged offenses. . . . In sum, the defendant . . . must have intentionally engaged . . . [in the conspiracy] for the purpose of furthering the illegal undertaking.

On the second element, knowledge of the unlawful aims of the conspiracy, the court gave a "conscious avoidance" charge, the essence of which was that:

> A defendant may be found by you, the jury, to have knowledge of the conspiracy's unlawful objective if he or she acted with deliberate disregard of a high probability that the conspiracy had such an objective, unless you find that the or she actually believed that such an objective did not exist.

We consider each of these instructions in turn.

A. "Knowing Participation and Educational Background of Defendant

Fletcher, a non-practicing attorney with an accounting background, claims that the district court erred when it instructed the jury that it could consider "the nature and extent of a defendant's educational and career background and expertise . . . but only as it relates to the question [of] specifically [sic] intent to commit the alleged offense." Fletcher maintains that this instruction, coming in the middle of the court's instruction on membership in the conspiracy, invited a jury to infer his knowing membership in the conspiracy from what he ought to have known about the tax law. Thus, Fletcher asserts that the trial court incorrectly diluted the conspiracy requirement of awareness, or actual knowledge, of the scheme to defraud. See

United States v. De Biasi, 712 F.2d 785, 792-93 (2d Cir.), cert denied sub nom. Eboli v. United States, 464 U.S. 962 (1983).

Significantly, the defendants' brief omits the word "intent" from his reading of the challenged portion, so that his version is that the jury was told it could consider "the nature and extent of a defendant's educational and career background and expertise . . . but only as it relates to the question specifically to commit the alleged offense." While this version may add cohesion to the defendant's claim, it is incorrect. The court's use of the words "intent to commit" signalled to the jury that the defendant's background was relevant on the question of intent.

In a prosecution for tax evasion, what counts is the subjective belief of a de-

fendant that his conduct will result in an unlawful evasion of taxes, not the degree to which tax laws are, or should be, objectively comprehensible to that defendant. Cheek v. United States, 111 S.Ct. 604 (1991); United States v. MacKenzie, 777 F.2d 811, 818 (2d Cir. 1985), cert. denied, 476 U.S. 1169 (1986). We hold, as we have in the past, that the trier of fact may properly consider the general educational background and expertise of the defendant as bearing on the defendant's ability to form the requisite wilful intent. See MacKenzie, 777 F.2d at 818; United States v. Jacobs, 475 F.2d 270, 280 (2d Cir.), cert. denied sub nom. Lavelle v. United States, 414 U.S. 821 (1973); see also United States v. Rischard, 471 F.2d 105, 108 (8th Cir. 1973).

It would have been preferable if this instruction, instead of coming in the midst of instructions on participation in the conspiracy, had been included with the instruction on specific intent. However, in view of the trial court's instruction to the jury that "you are to accept the law from the Court, this is from me, considering my charge as a whole" and our reminder in United States v. Torres, 901 F.2d 205, 240 (2d Cir. 1990) (quoting United States v. Birnbaum, 373 F.2d 250, 257 (2d Cir.), cert. denied 389 U.S. 837 (1967)) that "'[o]ften isolated statements taken from the charge, seemingly prejudicial on their face, are not so when considered in the context of the entire record of the trial,'" we find that the challenged instruction did not constitute error requiring reversal. Viewing the charge in

its entirety, Cupp v. Naughten, 414 U.S. 141, 146-47 (1973), the jury was properly warned that reckless ignorance of the tax law does not constitute willful intent to violate the law, that willful participation in a conspiracy requires "specific intent to do something the law forbids" and that the Fletchers were not guilty if they "actually believed that the agreement and understandings would not be used to defraud the Internal Revenue Service." In this light, it was not error for the court to instruct the jury that it could consider educational background and experience on the question of intent.

B. Knowledge of Unlawful Aims and Conscious Avoidance Charge

The defendants argue that the district court erred in giving a conscious avoidance charge, both because the defendants did not

"contest some specific aspect of knowledge necessary for conviction" and because there was no "adequate factual predicate for the charge." United States v. Civelli, 883 F.2d 191, 194, 195 (2d Cir.), cert. denied, 110 S.Ct. 409 (1989) (citation omitted). They assert that because they conceded knowledge that the goal of the conspiracy was to minimize tax liability and denied only knowledge that certain means of achieving this goal were illegal, such a charge confused the jury. Thus, the defendants do not challenge the form of the charge; they claim that it was reversible error to give it at all. See, e.g., United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096, 1099 (9th Cir. 1985); United States v. Beckett, 724 F.2d 855, 856 (9th Cir. 1984). We disagree.

The conscious avoidance charge is commonly used in this circuit where a defendant claims lack of some specific aspect of knowledge necessary for conviction but where the evidence may be interpreted as deliberate ignorance. Lanza, 790 F.2d at 1022. Here, there is no basis for the defendants' assertion that there was no dispute over any specific aspect of their knowledge save that their conduct would violate the tax laws. The defendants' brief points out that they "denied the government's allegation that the goal of the undertaking was to defraud the IRS" and offered affirmative evidence that the "goals of the agreement" to use CPL as the vehicle for the commemorative rifle undertaking were "lawful." As in most tax fraud cases, the core dispute was whether the largely conceded business activities of the

defendants were part of a knowing scheme to defraud the IRS. We have repeatedly held that a conscious avoidance charge is appropriate where the knowledge of the fraudulent goals of a conspiracy, as contrasted with knowing and intentional participation in the conspiracy, is at issue. United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1195 (2d Cir.), cert. denied sub nom. Lavery v. U.S., 110 S.Ct. 324 (1989); Gurary, 860 F.2d at 527; United States v. Heineman, 801 F.2d 86, 94 (2d Cir. 1986), Gurary, 860 F.2d 1986), cert. denied, 479 U.S. 1094 (1987); Lanza, 790 F.2d at 1022-23.

A factual predicate for the conscious avoidance charge existed in the ample evidence from which the jury could infer that defendants consciously avoided knowing the conspiracy's fraudulent purpose. While the

defendants maintained that, at all times, they were unaware of this purpose, the jury heard evidence of Fletcher's silent interest in the commemorative firearm project and the CPL partnership, Mrs. Fletcher's use of aliases, the fraudulent activities of the CPL partnership, the commingling of CPL and MSW funds, the failure to file partnership returns, the failure to provide accountants with accurate information, use of false taxpayer identification numbers, surreptitious movements of funds in the Bahamas and the use of fraudulent invoices that inflated the costs of the lithographs furnished to commemorative firearm customers. Moreover, "[t]he present case . . . [did] not involve merely a single transaction." Gurary, 860 F.2d at 527. The jury was plainly entitled to view the defendants' alleged ignorance of the con-

spiracy's objectives in the face of such evidence as conscious avoidance. Thus, it was appropriate for the district court to have given this charge.

III. Exclusion of Evidence

The defendants sought to introduce expert testimony from a certified public accountant, Gary Palmer, as to the lawful tax advantages that existed prior to 1976 for setting up foreign trusts on a theory that from 1980 to 1983, the time of the acts charged in the indictment, many people continued to believe that a lawful tax advantage existed for distributions by foreign trusts. They also offered the accountant's testimony as to the taxation of foreign corporations owned by United States citizens between 1980 and 1983. The defendants challenge the district court's refusal to admit this evidence and claim

that as a result they were denied their right to present a full defense.

A trial court has broad discretion to determine relevancy and whether the probative value of evidence may be outweighed by other considerations such as its tendency to confuse the jury. United States v. Bilzerian, No. 89-1502, slip op. 7561, 7575-78 (2d Cir. Jan. 3, 1991); United States v. Vanwort, 887 F.2d 375, 388 (2d Cir. 1989), cert. denied sub nom. Chapoteau v. United States, 110 S.Ct. 1927 (1990; United States v. Cruz, 797 F.2d 90, 95 (2d Cir. 1986).

We see no basis to disturb the district court's ruling on the proffered testimony of the defense expert. The proffer was made after the testimony of Quirini, Morrison and Mrs. Fletcher but before that of Fletcher. At the time of the proffer,

there was no testimony as to any foreign corporations and Quirini, Morrison and Mrs. Fletcher had testified that no money had been placed in trust accounts. Later, while Fletcher testified that the use of foreign corporations and trusts had been discussed by the conspirators and that, in substance, such use had lawful tax advantages, he testified that he did not have a trust account or own a corporation in the Bahamas. In view of this testimony, the district court did not abuse its discretion in excluding largely irrelevant evidence as to foreign trust tax effects in the United States that ceased to exist four years prior to the time of the acts alleged in the indictment and as to foreign corporation tax consequences which were not at issue in this case. The district court was not "manifestly erroneous" in excluding the

proffered testimony as irrelevant under Fed. R. Evid. 401, United States v. Diaz, 878 F.2d 608, 616 (2d Cir.), cert. denied, 110 S.Ct. 543 (1989); United States v. Kraeger, 711 F.2d 6, 7-8 (2d Cir. 1983), especially because explaining the tax law is generally within the purview of the court, not expert witnesses. See, e.g., Kraeger, 711 F.2d at 7-8. Nor did the district court compromise the fifth amendment's guarantee of due process. See Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986); United States v. Corr, 543 F.2d 1042, 1051 (2d Cir. 1976). The district court also did not err in excluding the expert evidence pursuant to Fed. R. Evid. 702. The most such evidence could have done would have been to lend credence to Fletcher's claim, fully presented to the jury, that when foreign trusts and foreign

corporations owned by United States citizens were discussed, he believed there were lawful tax advantages to such vehicles. But this marginal assistance to Fletcher would likely have contributed to jury confusion, not enlightenment, in view of Fletcher's testimony that he did not have a trust account or own a corporation in the Bahamas. Rule 702 predicates the admissibility of expert testimony on its assisting the jury. The district court did not abuse its discretion in excluding the Palmer testimony in this case.

For all of the foregoing reasons, the judgments of the district court are affirmed.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL NO. N-89-21 (TFGD)
CALVERT H. FLETCHER aka HUGH FLETCHER	:	
N. KARENE FLETCHER aka KARENE GRIMSLEY aka KARENE HAGAN aka KARENE (GRIMSLEY) HAGAN aka KAY HAGAN aka N.K. (GRIMSLEY) FLETCHER	:	VIOLATION: 18 U.S.C. 371 (Conspiracy to Defraud U.S.; Impede and Impair I.R.S.)

INDICTMENT

The Grand Jury charges:

COUNT ONE

THE CONSPIRACY

1. From on or about November 1979, the exact date to the Grand Jury unknown, and continuing thereafter up to and including April 5, 1983, in the District of Connecticut and elsewhere, CALVERT H. FLETCHER aka HUGH FLETCHER, the defendant herein, N. KARENE FLETCHER aka KARENE GRIMSLEY aka

KARENE HAGAN aka KARENE (GRIMSLEY) HAGAN aka KAY HAGAN aka N. K. (GRIMSLEY) FLETCHER, the defendant herein, Robert G. Morrison, and Gene Quirini did unlawfully, willfully and knowingly conspire, combine, confederate, and agree together and with each other and with other individuals both known and unknown to the Grand Jury to defraud the United States by impeding, impairing, obstructing, and defeating the lawful Government functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and collection of revenue: to wit, income taxes.

PARTIES, PERSONS AND ENTITIES

At all relevant times,

2. The defendant CALVERT H. FLETCHER aka HUGH FLETCHER, was a silent partner in

Commemorative Products, a Branford, Connecticut partnership.

3. The defendant N. KARENE FLETCHER aka KARENE GRIMSLEY aka KARENE HAGAN aka KARENE (GRIMSLEY) HAGAN aka KAY HAGAN aka N. K. (GRIMSLEY) FLETCHER. who married the defendant CALVERT H. FLETCHER aka HUGH FLETCHER in 1982, acted as a nominee or "front" for the hidden interests of defendant CALVERT H. FLETCHER aka HUGH FLETCHER in Commemorative Products.

4. Commemorative Products, was a Connecticut partnership located at 76 Maple Street, Branford, Connecticut, formally entered into in or about April 1980, the exact date to the Grand Jury unknown, by Robert G. Morrison, on behalf of Morrison Security Wholesale, Inc. and Gene Quirini, purportedly on behalf of G & A Quirini, an Illinois partnership, aka GAQ, and later

joined by defendant N. KARENE FLETCHER aka KARENE GRIMSLEY aka KARENE HAGAN aka KARENE (GRIMSLEY) HAGAN aka KAY HAGAN aka N. K. (GRIMSLEY) FLETCHER, both as nominees or "fronts for the hidden interest of defendant CALVERT H. FLETCHER aka HUGH FLETCHER. Commemorative products was established by defendant CALVERT H. FLETCHER aka HUGH FLETCHER, Robert G. Morrison and Gene Quirini for the purpose of marketing and distributing Winchester Commemorative issue border patrol rifles. Commemorative Products was terminated by formal agreement on April 5, 1983.

5. Robert G. Morrison, an unindicted co-conspirator, was 100% stockholder of Morrison Security Wholesale, Inc. which was the managing partner of Commemorative Products.

6. Morrison Security Wholesale, Inc., was a Connecticut corporation, with operating carry-forward losses through and including December 31, 1980, located at 76 Maple Street, Branford, Connecticut and a federally licensed firearms dealer, upon whose books and records the transactions of Commemorative Products were recorded and upon whose 1981 and 1982 corporate tax returns the Commemorative Products income was reported.

7. Gene Quirini, an unindicted co-conspirator, was a 50% partner of G & A Quirini, an Illinois partnership, aka GAQ, of Chicago, Illinois, the second signator partner of Commemorative Products and a "front" for the hidden interests of defendant CALVERT H. FLETCHER aka HUGH FLETCHER.

8. Olin Corporation Winchester Division (OC/WD) and its successor U.S. Repeat-

ing Arms Company (USRAC) manufactured the commemorative issue border patrol rifle distributed by Commemorative Products. Defendant CALVERT H. FLETCHER aka HUGH FLETCHER was director of manufacturing at OC/WD and was president of USRAC.

9. Willowdale Industries, a front corporation, maintained an account in a branch of the Bank of Nova Scotia in Freeport, Bahamas, believed to be controlled by the defendant CALVERT H. FLETCHER aka HUGH FLETCHER, to which advance moneys of Commemorative Products were deposited.

MANNER AND MEANS BY WHICH THE CONSPIRACY WAS CARRIED OUT

The manner and means by which the conspiracy was sought to be accomplished included, among others, the following:

10. To hide the true interests of defendant CALVERT H. FLETCHER aka HUGH FLETCHER in the income and profits of Commemorative Products Gene Quirini, using his partnership G & A Quirini, aka GAQ, and the defendant N. KARENE FLETCHER aka KARENE GRIMSLEY aka KARENE HAGAN aka KARENE (GRIMSLEY) HAGAN aka KAY HAGAN aka N. K. (GRIMSLEY) FLETCHER, served as nominees or front partners in Commemorative Products.

11. To hide the true interests of defendant CALVERT H. FLETCHER aka HUGH FLETCHER in the income and profits of Commemorative Products, CALVERT H. FLETCHER aka HUGH FLETCHER, Gene Quirini and Robert G. Morrison agreed to keep defendant Fletcher's interest hidden.

12. To divert partnership profits to their own use and to conceal such profits from ascertainment by the Internal Revenue

Service, defendant CALVERT H. FLETCHER aka HUGH FLETCHER, Gene Quirini and Robert G. Morrison agreed to conceal the profits of Commemorative Products by disguising them as the cost of a lithograph whose price was artificially and fraudulently inflated by defendant CALVERT H. FLETCHER aka HUGH FLETCHER and to transfer Commemorative Products' advance money to a bank account in the Bahamas.

13. To impede the Internal Revenue Service in the ascertainment of the partners involved in Commemorative Products and of the income and profits thereof, Robert G. Morrison willfully and intentionally failed to file partnership returns as required by law.

14. To impede the Internal Revenue Service in the ascertainment of the income and profits of Commemorative Products, Robert

Morrison entered Commemorative Products transactions on the books and records of Morrison Security Wholesale, Inc. and instructed his accountant to treat all the profits of Commemorative Products as income attributable solely to Morrison Security Wholesale, Inc., a loss corporation, thus offsetting the reported profits of Commemorative Products against carry forward losses of Morrison Security Wholesale, Inc.

OVERT ACTS

In furtherance of the conspiracy, and to effect the objects thereof, the following overt acts were committed in the District of Connecticut and elsewhere:

15. On or about November, 1979, the exact date to the Grand Jury unknown, defendant CALVERT H. FLETCHER aka HUGH FLETCHER discussed with Robert G. Morrison the marketing of a commemorative issue

rifle and the manufacture of the rifle by OC/WD.

16. On or about November or December, 1979, the exact date to the Grand jury unknown, defendant CALVERT H. FLETCHER aka HUGH FLETCHER introduced Robert G. Morrison to Gene Quirini.

17. On various occasions from December 1979 through April 1980, the exact dates to the Grand Jury unknown, the defendant CALVERT H. FLETCHER aka HUGH FLETCHER, Robert G. Morrison and Gene Quirini discussed the partnership to market the commemorative rifle which came to be called Commemorative Products and reached an understanding about hiding its profits from the Internal Revenue Service.

18. In April 1980, the exact date to the Grand Jury unknown, a partnership agreement establishing a Connecticut part-

nership known as Commemorative Products was executed by Robert G. Morrison, on behalf of the named partner Morrison Security Wholesale, Inc., and by Gene Quirini, on behalf of the named partner Morrison Security Wholesale, Inc., and by Gene Quirini, on behalf of the named partner G & A Quirini, an Illinois partnership.

19. Gene Quirini concealed the interest of G & A Quirini aka GAQ in Commemorative Products from his 50% partner in G & A Quirini, Anthony Quirini.

20. Sometime in 1980 or 1981, the exact date to the Grand Jury unknown, defendant CALVERT H. FLETCHER aka HUGH FLETCHER, through the defendant N. KARENE FLETCHER aka KARENE GRIMSLEY aka KARENE HAGAN aka KARENE (GRIMSLEY) HAGAN aka KAY HAGAN aka N. K. (GRIMSLEY) FLETCHER, Robert Morrison and Gene Quirini each contributed one-third

of $25,000 as "seed money" for Commemorative Products.

21. Sometime between 1980 and 1983, the exact date to the grand jury unknown, the defendant N. KARENE FLETCHER aka KARENE GRIMSLEY aka KARENE HAGAN aka KARENE (GRIMSLEY) HAGAN aka KAY HAGAN aka N. K. (GRIMSLEY) FLETCHER was purportedly assigned a portion of G&A Quirini aka GAQ's interest in Commemorative Products.

22. On or about May 12, 1980, in Chicago, Illinois, an account #294691, in the name of Commemorative Products, Ltd., was opened at American National Bank and Trust Company of Chicago, by Gene Quirini and Robert G. Morrison.

23. On various dates in 1980 and 1981, at the direction of defendant CALVERT H. FLETCHER aka HUGH FLETCHER, Robert G. Morrison transferred $251,000 of Commemo-

rative Products advance money to Gene Quirini, who then deposited those funds in account #294691 at the American National Bank and/or into a money market account, #46212301, at the Milwaukee Company in Chicago, Illinois.

24. On or about July 10, 1980, Gene Quirini, at the direction of defendant CALVERT H. FLETCHER aka HUGH FLETCHER, drew check #1003, on account #294691, made payable to defendant NELDA GRIMSLEY aka N. KARENE FLETCHER aka KARENE GRIMSLEY aka KARENE HAGAN aka KARENE (GRIMSLEY) HAGAN aka KAY HAGAN aka N. K. (GRIMSLEY) FLETCHER in the amount of $5,000 for the purpose of opening "Bahamas trusts." The defendant N. KARENE FLETCHER aka KARENE GRIMSLEY aka KARENE HAGAN aka KARENE (GRIMSLEY) HAGAN aka KAY HAGAN aka N. K. (GRIMSLEY)

FLETCHER, endorsed check #1003 as "Nelda Grimsley."

25. On or about May 29, 1981, at the direction of defendant CALVERT H. FLETCHER aka HUGH FLETCHER, Gene Quirini had account #294691 debited in the amount of $50,000 and received a cashiers check #982967 in that amount, made payable to Willowdale Industries, which he then sent by messenger to the defendant KAY HAGAN aka N. KARENE FLETCHER aka KARENE GRIMSLEY aka NELDA GRIMSLEY aka KARENE HAGAN aka KARENE (GRIMSLEY) HAGAN aka N. K. (GRIMSLEY) FLETCHER in Old Storybrook, Connecticut.

26. Sometime in 1981, the exact date to the Grand Jury unknown, defendant CALVERT H. FLETCHER aka HUGH FLETCHER gave Robert G. Morrison a false invoice for lithographs.

27. On or about August 11, 1981, Robert G. Morrison, at the direction of defendant CALVERT H. FLETCHER aka HUGH FLETCHER, wire-transferred $5,000 from Commemorative Products account #011200922 at the First Bank in Branford, Connecticut to an account in the name of Willowdale Industries at the Bank of Nova Scotia in Freeport, Bahamas.

28. On or about September 4, 1981, Robert G. Morrison, at the direction of defendant CALVERT H. FLETCHER aka HUGH FLETCHER, wire-transferred $20,000 from account # 011200922 to the Willowdale Industries account in the Bahamas.

29. On or about November 12, 1981, Robert G. Morrison, at the direction of defendant FLETCHER, wire-transferred $125,000 from account # 011200922 to the Willowdale Industries account in the Bahamas.

30. On or about November 23, 1981, at the direction of defendant CALVERT H. FLETCHER aka HUGH FLETCHER, Robert Morrison traveled to Freeport, Bahamas.

31. On or about February 11, 1982, defendant CALVERT H. FLETCHER aka HUGH FLETCHER, defendant N. KARENE FLETCHER aka KARENE GRIMSLEY aka NELDA GRIMSLEY aka KARENE HAGAN aka KARENE (GRIMSLEY) HAGAN aka KAY HAGAN aka N. K. (GRIMSLEY) FLETCHER, Robert G. Morrison, Gene Quirini and others traveled to Freeport, Bahamas.

32. On various dates between August 22, 1980 and May 24, 1982, Gene Quirini, at the direction of defendant CALVERT H. FLETCHER aka HUGH FLETCHER, used Commemorative Products advance money to pay bills and interest payments totaling $58,912.50 on behalf of Vanderson's Corporation and Carboy Partnership.

33. On or about March 15, 1982, Robert G. Morrison willfully failed to file a partnership return for Commemorative Products for the calendar year 1981.

34. Between August and December 1982, the exact dates to the Grand Jury unknown, Robert G. Morrison, upon the instruction of defendant CALVERT H. FLETCHER aka HUGH FLETCHER, did not reveal details regarding Commemorative Products and its true participants to his accountant.

35. On or about December 10, 1982, Robert G. Morrison, as president of Morrison Security Wholesale, Inc., caused a 1981 corporate return to be filed which included the income and deductions of Commemorative Products.

36. In March, 1983, the exact date to the Grand Jury unknown, defendant CALVERT H. FLETCHER aka HUGH FLETCHER arranged for

the U.S. Repeating Arms Co. to redeem from Robert G. Morrison 165 shares of common stock of the company at a price of $1500.00 per share.

37. On or about March 15, 1983, Robert G. Morrison willfully failed to file a partnership return for Commemorative Products for the calendar year 1982.

38. On or about April 5, 1983, the Commemorative Products partnership was terminated by an agreement signed by Robert G. Morrison, Gene Quirini, and the defendant N. KARENE FLETCHER aka KARENE GRIMSLEY aka KARENE HAGAN aka KARENE (GRIMSLEY) HAGAN aka KAY HAGAN aka N. K. (GRIMSLEY) FLETCHER, who signed in the name "KARENE GRIMSLEY HAGAN." Defendant N. KARENE FLETCHER aka KARENE GRIMSLEY aka KARENE HAGAN aka KARENE (GRIMSLEY) HAGAN aka KAY HAGAN aka N. K. (GRIMSLEY) FLETCHER, using

the name "KARENE GRIMSLEY HAGAN" and Gene Quirini executed a promissory note in favor of Robert G. Morrison guaranteed by defendant CALVERT H. FLETCHER aka HUGH FLETCHER.

All in violation of Title 18, United States Code, Section 371.

A TRUE BILL

/s/ Melvin Alden

/s/ Stanley A. Twardy, Jr.
STANLEY A. TWARDY, JR.
UNITED STATES ATTORNEY

/s/ Linda K. Lager
LINDA K. LAGER
ASSISTANT UNITED STATES ATTORNEY

/s/ Peter D. Markle
PETER D. MARKLE
ASSISTANT UNITED STATES ATTORNEY

OFFER OF PROOF AS TO EXCLUDED TESTIMONY

[The following is excerpted from the transcript of proceedings of September 19, 1989, pages 144-47, and includes the Petitioners' offer of proof as to what the witness Gary Palmer would have testified, as well as the Government's response to such offer and the trial court's ruling excluding such testimony]:

MR. BREDEMANN: Do you want me to do it on or do it through the witness?

THE COURT: No, I want to hear you give me an offer of proof.

MR. BREDEMANN: Your Honor, as to foreign trusts --

THE COURT: You said you wanted to make an offer of proof about foreign corporations.

MR. BREDEMANN: But earlier I believe I said it as both, Judge

THE COURT: Go ahead with whatever you're going to do.

MR. BREDEMANN: I believe Mr. Palmer would testify as to trusts in general that income generally in what is called a grantor trust would go through the trust to the grantor. And that in the case of a trust, foreign trust, a grantor foreign trust, that up to 1976 there was a tax advantage to foreign trusts. That advantage was that as opposed to a trusst [sic] in the United States, foreign trusts, a person who was considered the beneficiary of that trust would have on a ratio return to him capital gains and ordinary income, whereas -- or I believe it's principal and ordinary income. And whereas in the United States that the return is first made if there is a payout from the trust or the trust is the recipient from this money first as to ordinary

income. That there was a tax advantage to foreign trusts. And in 1976 there's a substantial revision to the Internal Revenue Service Code, and at that time this advantage was extinguished.

Further, that given the magnitude of this particular exchange, that there were many people for a long period of time who still believe that that advantage exists in terms of the payout from foreign trusts.

As to foreign corporations, I believe Mr. Palmer will testify that if a U.S. taxpayer is a shareholder in a foreign corporation, that the foreign corporation is taxed at the local rate; that is, the rate of the country in which it resides and rather than the rate at which United States corporations are taxed. And as long as dividends are not paid by that corporation there is no tax effect upon the U.S. citi-

zen. That once dividends are -- they are made, they have access to those funds that they would be taxed at the regular rate for a United States citizen.

That very generally is what Mr. Palmer would testify to with going into some more detail particularly as to the impact of various sections upon that.

THE COURT: All right. Thank you.

MS. LAGER: Does Your Honor wish a response from the Government on the offer of proof?

THE COURT: I have some difficulty with the relevance, but you're objecting, I'm not. So I'll hear you on the objection.

MS. LAGER: I'm objecting again, renewing on grounds of relevance, and also potential confusion to the jury, given the fact that there is simply no evidence in

this case, first of all, of the existence of anything called a grantor foreign trust, nor is there any evidence in this case a foreign corporation with a U.S. taxpayer having a shareholder interest.

In addition to that, any confusion that some people may have been under after 1976, certainly has no bearing on events, specific events, alleged in this case starting in late 1979 going through early '80's.

MR. BREDEMANN: I rest on the comments I made earlier.

THE COURT: I sustain the Government's objections. I'm sorry, because I'd kind of like to hear what you have to say, but I don't think it's anything that the jury should be involved with in this case by any remote consideration. But we'll take our after recess [sic] and resume at 3:30.

EXCERPTS OF CHARGE TO JURY

[The following is excerpted from the trial court's charge to the jury and appears at pages 143-44 of the transcript of proceedings of September 22, 1989.]:

If you conclude that a conspiracy did exist as alleged, you should next determine whether the defendants, each of them, knowingly and willfully became a member of the conspiracy. In other words, did the defendant you are considering -- as I've already told you, you must consider them separately -- did the defendant you are considering participate in the conspiracy with knowledge of its unlawful purpose and with a specific intention of furthering its business or objective as an associate or worker. The key question is whether a defendant joined the conspiracy with an

awareness of at least some of the basic aims and purposes of the unlawful agreement. A defendant's participation in the conspiracy may be established by evidence of his or her own acts and statements, as well as those of the alleged other co-conspirators, and the reasonable inferences which may be drawn therefrom. You may also consider the nature and extent of a defendant's educational and career background and expertise in this regard, but only as it relates to the question specifically intent [sic] to commit the alleged offense.

[The following excerpt from the jury charge appears at pages 147-49 of the transcript]:

Now, in order to conclude that a defendant acted knowingly, it is not necessary for the Government to show that he or she had actual knowledge that the objective of

the conspiracy was to impede, impair, obstruct or defraud the Internal Revenue Service in the ascertainment, computation, assessment or collection of revenue, that is income taxes, although that certainly is one way that knowledge may be proved.

A defendant may be found by you, the jury, to have knowledge of the conspiracy's unlawful objective if he or she acted with deliberate disregard of a high probability that the conspiracy had such an objective, unless you find that he or she actually believed that such an objective did not exist.

In order to convict a defendant of conspiracy, the Government must prove that he or she had the specific intent to commit the crime charged.

My instruction on conscious avoidance is pertinent only to a defendant's knowledge

or sincerity of belief as to the objectives of the conspiracy and cannot alone provide the basis for a finding of intent.

Conscious avoidance, if found, may lead you to conclude that a defendant had knowledge of the unlawful objectives, but not to establish knowing participation or membership in the conspiracy charge. To state this proposition another way, there are two types of knowledge involved in the conspiracy charge. The first of which knowing participation requires specific intent, but the second of which knowledge of the unlawful objectives may be satisfied by showing conscious avoidance. Therefore, on the issue of a defendant's knowledge of the objectives, the second type of conspiracy, you may consider whether the defendant deliberately closed his or her eyes on what otherwise would have been obvious, however

guilty, knowledge of the unlawful nature of the conspiracy, if you find such to exist, cannot be established by demonstrating mere negligence or even foolishness or recklessness on the part of a defendant. You may find that a defendant knew the purpose of the conspiracy was to defraud the Internal Revenue Service. If you find that one of the defendants you are considering was aware of a high probability that the alleged agreement and understandings entered into by and between the alleged conspirators would have the effect of defrauding the United States by impeding, impairing, obstructing, and defeating the lawful government functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of the revenue, that is income taxes. Two, the defendant acted with deliberate disregard

of how such agreement and understandings would be used with a conscious purpose to avoid learning the truth on the subject.

In summary, a defendant may be found to have knowledge of the conspiracy's unlawful objectives if he or she acted with deliberate disregard that the agreement and understandings would be used to defraud the Internal Revenue Service, unless you find that the defendant that you are considering actually believed that the agreement and understandings would not be used to defraud the Internal Revenue Service.

FILED
JUL 26 1991
OFFICE OF THE CLERK

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No. 90-1826

In the Supreme Court of the United States

OCTOBER TERM, 1991

CALVERT H. FLETCHER, AKA "HUGH FLETCHER," AND N. KARENE FLETCHER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
SHIRLEY D. PETERSON
Assistant Attorney General
ROBERT E. LINDSAY
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QUESTIONS PRESENTED

1. Whether the prosecution was barred by the statute of limitations.

2. Whether the district court properly gave the jury a "conscious avoidance" instruction.

3. Whether the district court properly instructed the jury that it could consider petitioners' educational and career backgrounds in determining intent.

4. Whether the district court erred in determining that expert testimony proffered by petitioner should be excluded as irrelevant.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1826

CALVERT H. FLETCHER, AKA "HUGH FLETCHER," AND N. KARENE FLETCHER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 928 F.2d 495.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1991. The petition for a writ of certiorari was filed on May 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioners Calvert H.

Fletcher and N. Karene Fletcher were convicted on one count of conspiracy to defraud the United States by impairing and impeding the lawful governmental functions of the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371. Petitioner Calvert H. Fletcher was sentenced to 22 months' imprisonment and a $10,000 fine. Petitioner N. Karene Fletcher was sentenced to two years' imprisonment, with all but two months suspended, and a $10,000 fine. The court of appeals affirmed.

1. The evidence at trial showed that Robert G. Morrison approached petitioner Calvert Fletcher with a plan to manufacture and market a commemorative rifle. Mr. Fletcher agreed to convince his employer, Winchester Firearms, to manufacture the rifle. Morrison and Fletcher agreed that Fletcher would receive a 50% interest in the anticipated profits of the venture. To conceal his conflict of interest from Winchester, Fletcher arranged to have his interest in the venture held in the names of Gene Quirini and Fletcher's future wife, petitioner N. Karene Fletcher. Pet. App. 3-5.

Morrison, Quirini, and Mrs. Fletcher formed a partnership to market the rifles, which operated under the name Commemorative Products, Ltd. (CPL). The conspirators agreed to record the profits of CPL on the books of Morrison's Security Wholesale, Inc. (MSW), a corporation controlled by Morrison, apparently because the profits could be offset against carry-forward losses held by MSW. The conspirators also agreed to minimize CPL's apparent taxable profits by distributing numbered lithographic prints with the rifles and artificially inflating the cost of the prints. Finally, the conspirators agreed to transfer a portion of the profits to a Bahamian bank account controlled by Mr. Fletcher and held in the name of a shell corporation, ostensibly to cover the costs of printing the lithographs. Pet. App. 5-6.

The scheme eventually fell apart because of infighting among the conspirators. Quirini, on behalf of Mr. Fletcher and unbeknownst to Morrison, used $253,000 in advance payments from gun customers to pay for expenses of businesses unrelated to the rifle venture. Quirini also opened an account, using a false taxpayer identification number, to which only he and Mr. Fletcher had access and into which he deposited some of the profits generated by CPL. Morrison soon discovered the misuse of the CPL funds, however, because CPL fell behind in its payments to Winchester. After Morrison confronted Mr. Fletcher with the irregularities, Fletcher agreed that he would pay Morrison his proper share of the profits. Fletcher made that payment on April 5, 1983, by causing Quirini and Mrs. Fletcher to execute a $50,000 promissory note to Morrison, and by causing Mrs. Fletcher to execute a stock escrow agreement that would cause certain stock to be delivered to Morrison on January 1, 1984. On that same day, Morrison, Quirini, and Mrs. Fletcher dissolved CPL. Petitioners were indicted and then convicted after a trial at which Morrison and Quirini testified for the government. Pet. App. 7-9.

2. The court of appeals affirmed. Pet. App. 1-35. The court first rejected petitioners' argument that the government had failed to show that one of the conspirators had committed an overt act within the six-year period preceding the indictment, as required by the applicable statute of limitations. *Id.* at 10-20. Because the April 5, 1983, promissory note to Morrison constituted a payoff of profits to Morrison, the court concluded that execution of the note was an overt act in furtherance of the conspiracy. Because that act occurred within the six-year limitations period, the court rejected petitioners' statute of limitations argument. *Id.* at 10-11, 16-19.

The court next rejected petitioners' challenges to certain jury instructions. The court held that the trial judge

properly had instructed the jurors that they could consider petitioners' educational background in determining whether they had the requisite intent, because "the trier of fact may properly consider the general educational background and expertise of the defendant as bearing on the defendant's ability to form the requisite wilful intent." Pet. App. 24; see *id.* at 20-26. The court also held that the trial court properly had given an instruction that petitioners could be found to have knowledge of the unlawful objectives of the conspiracy if they "acted with deliberate disregard of a high probability that the conspiracy had such an objective." *Id.* at 21. The court rejected petitioners' claim that such an instruction should be given only in cases in which the defendants "contest some specific aspect of knowledge necessary for conviction," noting that it was clear from the record that petitioners had contested the government's claim that they knew the conspiracy was unlawful. *Id.* at 27. Because of petitioners' acknowledged participation in the conspiracy, the court concluded that the government was entitled to argue that petitioners either knew that the conspiracy was illegal or must have consciously avoided obtaining that knowledge. See *id.* at 26-31.

Finally, the court of appeals rejected petitioners' claim that the trial court erred by excluding expert testimony about the advantages of using foreign trusts and foreign corporations. The court agreed with the trial court that the evidence properly was excludable for lack of relevance because there was no evidence that the conspiracy involved the use of either foreign trusts or foreign corporations. See Pet. App. 31-35.

ARGUMENT

1. Petitioners first argue (Pet. 19-26) that the court of appeals erred in holding that execution of the promissory

note on April 5, 1983, furthered the conspiracy alleged in the indictment and that the prosecution therefore was not time-barred. The limitations period for a conspiracy to defraud the United States in violation of 18 U.S.C. 371 is six years. 26 U.S.C. 6531(1). The grand jury returned the indictment on April 4, 1989, Pet. App. 10, so the government was required to prove that the conspiracy was still in existence on April 4, 1983, and that "at least one overt act in furtherance of the conspiracy was performed after that date," *Grunewald* v. *United States*, 353 U.S. 391, 396 (1957). As Justice Harlan explained for this Court in *Grunewald*, "the crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." *Id.* at 397.

The court of appeals correctly determined that the note was executed to secure for Morrison his share of the rifle profits. As the court pointed out (Pet. App. 17), Morrison testified that the note was to "make up for some of the funds that had been missing from the Bahamian account," funds that represented profits of the conspiracy that Quirini and the Fletchers had misappropriated. On the basis of that determination (which petitioners do not challenge, see Pet. 19-26), the court of appeals had no difficulty in determining that the execution of the note was well within the scope of the conspirators' agreement and "furthered one of [the conspiracy's] chief goals," because "the conspiracy contemplated a division of profits among the co-conspirators." Pet. App. 17; see *United States* v. *Nazzaro*, 889 F.2d 1158, 1162 (1st Cir. 1989); *United States* v. *Doherty*, 867 F.2d 47, 61-62 (1st Cir.), cert. denied, 492 U.S. 918 (1989); *United States* v. *Dynalectric Co.*, 859 F.2d 1559, 1568-1569 (11th Cir. 1988) (payments were important objectives of the con-

spiracy, not "hush money" paid to conceal crime), cert. denied, 490 U.S. 1006 (1989); *United States* v. *Potamitis*, 739 F.2d 784, 788 (2d Cir.) ("where a general objective of the conspirators is money, the conspiracy does not end, of necessity, before the spoils are divided among the miscreants") (quoting *United States* v. *Knuckles*, 581 F.2d 305, 313 (2d Cir.), cert. denied, 439 U.S. 986 (1978)), cert. denied, 469 U.S. 918, 934 (1984).

Petitioners do not dispute that the pursuit of money was a goal of their conspiracy. Rather, they claim that a monetary goal does not make execution of the promissory note an overt act in furtherance of the conspiracy, because the indictment "nowhere charges that the conspirators' making money was an objective of the conspiracy." Pet. 22. In their view, the court of appeals' decision thus resulted in "[c]onviction upon a charge not made," Pet. 25 (quoting *De Jonge* v. *Oregon*, 299 U.S. 353, 362 (1937)), because "[p]etitioners purely and simply were never called upon to answer any allegation that the distribution of money to the alleged conspirators was an objective of the alleged conspiracy," Pet. 22-23. Whatever the merits of petitioners' novel contention that an indictment charging conspiracy to defraud the IRS explicitly must state that monetary profit is one of the goals of the conspiracy, the contention does not even apply to the facts of this case: the indictment clearly informed petitioners that the government believed execution of the promissory note was an overt act in furtherance of the conspiracy, Pet. App. 53-54, and the indictment just as clearly advised petitioners that one of the objectives of the charged conspiracy was to "divert partnership profits to their own use," *id.* at 42-43.[1]

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[1] Petitioners are incorrect in suggesting (Pet. 23-24) that the decision below conflicts with the Ninth Circuit's opinion in *United States* v. *Walker*, 653 F.2d 1343 (1981), cert. denied, 455 U.S. 908 (1982).

2. Petitioners also contend (Pet. 27-35) that the court of appeals erred in approving the "conscious avoidance" or "deliberate ignorance" instruction given at trial. It is well settled that a conscious avoidance instruction is generally appropriate if a defendant claims to lack knowledge and the proof at trial supports an inference of deliberate ignorance. See, *e.g.*, *United States* v. *Kelm*, 827 F.2d 1319, 1323-1324 (9th Cir. 1987); *United States* v. *Lanza*, 790 F.2d 1015, 1022 (2d Cir.), cert. denied, 479 U.S. 861 (1986). As the court of appeals explained, petitioners contested their knowledge of illegality: they consistently "denied the government's allegation that the goal of the undertaking was to defraud the IRS." Pet. App. 28. Similarly, an adequate "factual predicate for the conscious avoidance charge existed in the ample evidence from which the jury could infer that defendants consciously avoided knowing the conspiracy's

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In *Walker*, the defendant was convicted of conspiring to defraud the United States by bid-rigging a timber sale by the United States Forest Service. There, as here, the court of appeals rejected a contention that the conspirators' division of the profits of the fraudulent scheme did not constitute action in furtherance of the conspiracy to defraud. 653 F.2d at 1346-1350.

Relying on *Bridges* v. *United States*, 346 U.S. 209 (1953), petitioners suggest (Pet. 26 n.10) that the government acted improperly in charging petitioners with conspiracy to defraud the IRS "where the real gravamen of the conduct alleged in the indictment is conspiracy to commit the substantive offense of [tax evasion], a charge which would clearly have been time-barred." But *Bridges* is totally inapposite here. As this Court explained in rejecting a similar claim in *Dennis* v. *United States*, 384 U.S. 855 (1966), *Bridges* "did not turn upon construction of § 371," but upon "whether a prosecution, otherwise time-barred, could be revived by reference to the Wartime Suspension of Limitations Act." 384 U.S. at 863 & n.8. More fundamentally, the fact that the conduct charged in the indictment might have violated one or more criminal statutes not covered by the indictment has no bearing on the merits of this prosecution under Section 371.

fraudulent purpose." Pet. App. 29; see *id.* at 30 (summarizing the evidence). Petitioners have suggested no reason why this Court should reconsider the court of appeals' evaluation of this evidence. Given the strong evidence that petitioners had clear notice that the conspiracy was aimed at hiding information from the IRS, they could have been unaware of the unlawful object of the conspiracy only if they had closed their eyes to it. Thus, the instruction was proper.

Petitioners raise two principal arguments against the ruling of the court of appeals on this point. First, they argue (Pet. 28 n.12) that the evidentiary predicate for the instruction was inadequate because there was no evidence that petitioners avoided learning about the tax consequences of any of their transactions. This contention is beside the point, because the indictment did not charge that the conspiracy unlawfully violated substantive tax laws. The illegality of the conspiracy, rather, was in the use of deceit to impede the functions of the IRS. As to this point, the court of appeals carefully summarized the substantial evidence that petitioners either knew the conspiracy was unlawful or consciously avoided gaining knowledge of its illegality. See Pet. App. 30.

Second, petitioners contend that the decision of the court of appeals conflicts with decisions of the Eighth, Ninth, and Tenth Circuits, which, according to petitioners, have held that it is error to give a conscious avoidance instruction where the evidence points to either direct knowledge or a lack of guilty knowledge. Pet. 32-35 (citing *United States* v. *Alvarado*, 838 F.2d 311, 314 (9th Cir.), cert. denied, 487 U.S. 1222, 488 U.S. 838 (1988); *United States* v. *Manriquez Arbizo*, 833 F.2d 244, 248-249 (10th Cir. 1987); *United States* v. *Kelm*, 827 F.2d 1319, 1323-1324 (9th Cir. 1987); *United States* v. *White*, 794 F.2d 367, 371 (8th Cir. 1986)). This contention is meritless. The cited cases stand for the

proposition that a conscious avoidance instruction is improper if the evidence points *only* to direct knowledge or lack of knowledge, as opposed to avoidance of knowledge. See, *e.g.*, *United States* v. *Perez-Padilla*, 846 F.2d 1182, 1183 (9th Cir. 1988) (explaining that the rule petitioners draw from *Alvarado* and *Kelm* does not apply "if there is evidence of both actual knowledge and of deliberate ignorance"); *Manriquez Arbizo*, 833 F.2d at 248-249 (explaining that the instruction is inappropriate only if "the evidence against the defendant points *solely* to direct knowledge" (emphasis added)); *United States* v. *White*, 794 F.2d at 371; *United States* v. *Glick*, 710 F.2d 639, 642 (10th Cir. 1983) (no error in giving deliberate ignorance instruction where evidence supported finding of either actual knowledge or deliberate avoidance of positive knowledge), cert. denied, 465 U.S. 1005 (1984). As discussed above, the court of appeals concluded that in this case there was "ample evidence from which the jury could infer that defendants consciously avoided knowing the conspiracy's fraudulent purpose." Pet. App. 29. Accordingly, there is every reason to believe that this case would have been decided the same way by any court of appeals.[2]

3. Petitioners also assert (Pet. 35-38) that the court of appeals erred in approving the trial court's instruction that the jury could consider petitioners' educational and career backgrounds in determining whether they acted with specific

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[2] Petitioners erroneously suggest (Pet. 32-33) that this alleged conflict was noted by the Second Circuit in *United States* v. *Mang Sun Wong*, 884 F.2d 1537, 1542 n.5 (1989), cert. denied, 110 S. Ct. 1140 (1990). That case suggests only that the Ninth Circuit may be slightly more restrictive than the Second Circuit in evaluating whether the facts of a particular case are sufficient to support the inference of conscious avoidance. The only case it cites on which petitioners rely is *United States* v. *Alvarado*, and its citation does not even discuss the passage on which petitioners rely. See 884 F.2d at 1542 n.5.

intent. That argument is without merit. The government often relies on circumstantial evidence to establish that defendants possessed the requisite intent for an offense. See, *e.g.*, *United States* v. *Candoli*, 870 F.2d 496, 511 (9th Cir. 1989); *United States* v. *Ashfield*, 735 F.2d 101, 105 (3d Cir.), cert. denied, 469 U.S. 858 (1984); *United States* v. *Puerto*, 730 F.2d 627, 630 (11th Cir.), cert. denied, 469 U.S. 847 (1984); see also *Holland* v. *United States*, 348 U.S. 121, 140 (1954). And courts have recognized that a defendant's education and experience are relevant factors in determining whether he was able to form the specific intent for an offense. *United States* v. *Rischard*, 471 F.2d 105, 108 (8th Cir. 1973) (trier of fact in tax evasion case "could have properly considered the general educational background and experience of the appellant as bearing on the appellant's ability to form the requisite wilful intent"); *United States* v. *Ashfield*, 735 F.2d at 107; *United States* v. *Jacobs*, 475 F.2d 270, 280 (2d Cir.), cert. denied, 414 U.S. 821 (1973); see also *Cheek* v. *United States*, 111 S. Ct. 604, 615 (1991) (Blackmun, J., dissenting). The evidence in this case established that Mr. Fletcher was an attorney and a business executive (C.A. App. 39, 90-91, 211-213, 219, 241) and that Mrs. Fletcher was a bookkeeper (C.A. App. 91, 215). Contrary to petitioners' contention (Pet. 36-37), their backgrounds were probative of intent: experience in business and bookkeeping tends to support an inference that petitioners were capable of recognizing and understanding the import of their conduct. Thus, the instruction at issue merely informed the jury of a factor it properly could consider in determining whether petitioners had the specific intent required for conviction.

Petitioners are incorrect in their suggestion (Pet. 37) that the court's instruction somehow lowered the burden of proof so that the jury convicted petitioners on the basis of negligent, rather than intentional, actions. The court of

appeals observed that "the jury was properly warned that reckless ignorance of the tax law does not constitute willful intent to violate the law, that willful participation in a conspiracy requires 'specific intent to do something the law forbids' and that the Fletchers were not guilty if they 'actually believed that the agreement and understandings would not be used to defraud the Internal Revenue Service.'" Pet. App. 26.[3]

4. Finally, petitioners claim (Pet. 39-44) that the district court erred in refusing to allow petitioners to introduce expert testimony regarding the tax advantages of foreign trusts and foreign corporations. As the court of appeals explained, the decision of the district court was unquestionably correct, because at the time petitioners attempted to introduce the testimony, "there was no testimony as to any foreign corporations and Quirini, Morrison and Mrs. Fletcher had testified that no money had been placed in trust accounts." Pet. App. 33.[4]

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[3] Petitioners' reliance on *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943), see Pet. 38, is similarly unavailing. The most that can be said about *Direct Sales* in this context is that it requires proof of a conspiracy to be "clear, not equivocal," and forbids "piling inference upon inference" to establish the elements of the crime. 319 U.S. at 711. Nothing in *Direct Sales* addresses the use of circumstantial evidence generally or the persuasive force of the evidence introduced in this case. Indeed, in *Direct Sales* itself, this Court upheld a drug company's conspiracy conviction on the basis of circumstantial evidence, namely that the company sold morphine sulphate to its co-conspirator, a doctor, "in such quantities, so frequently and over so long a period it must have known he could not dispense the amounts received in lawful practice and was therefore distributing the drug illegally." 319 U.S. at 705.

[4] Mr. Fletcher later testified that the conspirators had discussed using foreign corporations and trusts, but, as the court of appeals noted, "he testified that he did not have a trust account or own a corporation in the Bahamas." Pet. App. 33.

Petitioners do not attempt to rebut the analysis of the court of appeals, but instead argue (Pet. 39-41) that petitioners' understanding of the tax laws was probative of their intent to violate those laws. This proposition is of course true in the abstract, but for the reasons stated by the court of appeals it has nothing to do with this case. In the absence of any reason to believe that this case involved foreign trusts or foreign corporations, petitioners' views regarding the tax treatment of such entities are irrelevant. The district court therefore properly excluded the proffered evidence regarding those matters.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] There is no substance to petitioners' claim (Pet. 43-44) that the decision below conflicts with the decision of the Fifth Circuit in *United States* v. *Burton*, 737 F.2d 439 (1984). Nothing in *Burton* requires a court to admit irrelevant evidence. Indeed, in *Burton*, the Fifth Circuit expressly noted that "a trial judge's analysis of admissibility * * * begins with the decision that proffered evidence is relevant." *Id.* at 443.

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